

DWORKIN, PRECEDENT, CONFIDENCE, AND *ROE V. WADE*

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INTRODUCTION

January 22, 2004, marked the thirty-first anniversary of *Roe v. Wade*.¹ When the Supreme Court reconsidered and upheld the merits of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*² in 1992, the majority put front and center the importance of stare decisis. The Court cited Justice Benjamin Cardozo for the wisdom that a judicial system could not function if it considered each issue anew in every case that raised it.³ Precedent assumes a greater role in a special case like *Roe*, the majority said, where the “Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”⁴ Needless to say, *Roe* did not end the controversy, and with a GOP-controlled Congress and White House, *Roe*’s status is somewhat precarious.⁵ On January 23, 2003, President George W. Bush promised antiabortion protesters assembled on the National Mall “to protect the lives of innocent children waiting to be born” and pledged that his administration would promote “compassionate alternatives” to abortion.⁶ The Supreme Court likely stands one vote away from overturning *Roe*. As Justice Harry Blackmun himself noted

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¹ 410 U.S. 113 (1973).

² 505 U.S. 833 (1992).

³ *Id.* at 854 (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

⁴ *Id.* at 867.

⁵ See, e.g., *Activists Mark ‘Roe vs. Wade’ Anniversary*, USA TODAY, Jan. 22, 2003, available at http://www.usatoday.com/news/washington/2003-01-22-abortion-anniversary_x.htm (“Abortion opponents see their best chance in years to erode if not overturn *Roe*.”).

⁶ Sean Loughlin, *Bush Calls for Protection of ‘Children Waiting to be Born,’* CNN.COM, Jan. 23, 2003, at <http://www.cnn.com/2003/ALLPOLITICS/01/22/bush.abortion/index.html> (quoting President Bush).

in his opinion in *Casey*: "I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light."⁷ Within the next few years, it is likely that at least two Justices will step down, and depending on their replacements, the partial dissenters in *Casey* may garner the fifth vote necessary to overturn *Roe*.

The Voice of the Cynic and the Theoretical Response

It is conceivable that the political party that puts the next Justice on the bench will decide the fate of *Roe*. The cynic voices this concern with two grave charges. First, the cynic suspects that the new Justice will not only vote based solely on political persuasion, but also that she will do so against the mandate of stare decisis. That is, the Justice will disregard established law and vote solely on the basis of political preference. The second charge is somewhat different. The cynic argues that a judge can always fashion a legal argument to support how she would vote politically. So, the cynic is concerned that the judge will either ignore the law or simply shape the law to serve whatever outcome she desires. Perhaps the trend over the last twenty years of a polarized Supreme Court voting along party lines warrants such distrust.⁸

Whether or not such charges are descriptively accurate, a system of adjudication should take account of such concerns. When developing a theory of adjudication, one determines how judges *should* decide cases. That is, one asks what normative constraints should bind judges in the context of decision making, including whether to adhere to the doctrine of stare decisis. Applying this normative inquiry to *Roe*, I ask to what extent deference to prior reasoning should factor in the Court's decision.

In this context, I critically examine the role of confidence in Ronald Dworkin's theory of adjudication. Namely, I propose to answer the following two-part question: What should constitute a judge's confidence that a prior decision was wrongly decided, and how much confidence should be required to reject precedent? As to the first part, I will argue that a judge's confidence should reflect a good faith attempt to balance the underlying legal principles of the case. As to the second part, I will argue that common law standards governing

⁷ 505 U.S. at 923.

⁸ See, e.g., EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 515 (1998) (describing the "widening polarization" of the Court and the increasing ability of individual Justices to tip the majority).

the conditions under which one should defer to precedent should dictate the amount of confidence required.

With these requirements in place, neither concern of the cynic materializes. That is, if a judge has a sufficient degree of confidence—constituted by proper considerations—she will not decide a case like *Roe* on the basis of political persuasion, nor will she mold a legal argument to artificially reach the result she would have preferred if the law did not govern. This conclusion, however, requires certain assumptions about the nature of cases and judicial decision making. In the Section entitled “Good Faith,”⁹ I seek to reveal what one must assume to achieve the possibility that a judge can decide a case in good faith. Optimistically, one significant contribution of this Comment will be its attempt to make explicit the assumptions that underlie such a model of confidence and, more generally, judicial decision making within Dworkin’s theory of adjudication.

My project does not end there, however. I shall argue that, even where objective standards establish the level of confidence required to overturn precedent, a proper theory of adjudication must allow for disagreement among individual judges about what those objective standards are and what level of confidence they require. Such disagreement goes to the heart of the dispute over how to properly give *Roe* the respect it deserves. That is, a workable theory must allow judges to disagree over the very standards that should govern the degree of deference to which a case such as *Roe* is entitled. Ultimately, a theory of adjudication cannot provide a bedrock place of agreement, a starting point from which judges agree about how to treat precedent. Although such a conclusion is disappointing because it asserts that, even at the theoretical level, no ground on which the Court should agree can be established, this Comment finds such a conclusion inevitable.

Part I sets the stage with the background necessary to make sense of this project. There I explore Dworkin’s rejection of H.L.A. Hart’s conceptual understanding of judicial discretion, especially in the context of precedent. I then discuss the role of legal principle in Dworkin’s theory of adjudication, as well as the tradeoff it represents between stability and predictability on the one hand and the recognition of the possibility of error on the other. Part II sets forth the main argument of the Comment. I draw a distinction between first- and second-order legal principles, which I utilize to explain the grounds of

⁹ *Infra* Part II.D.

disagreement over the role of precedent. I address the questions regarding what confidence is and how much should be required in the context of rejecting precedent. Additionally, throughout Part II, I discuss the practical ramifications of the conclusions I reach on *Roe*.

I. HART, DWORKIN, AND DISCRETION

A. *Judicial Obligation: Positivism and Dworkin*

In the past thirty-five years, two important but fundamentally different legal theories have attempted to address the philosophical question of the nature of judicial obligation.¹⁰ The first approach is modern positivism, best represented by H.L.A. Hart¹¹ and Joseph Raz.¹² According to this view, a judge is obligated to apply the rules that the legal system recognizes as law. Such law might derive from precedent that judges establish or rules that the legislature or some other lawmaking body creates. As we shall see below, a rule does not always determine how a judge should decide a case. When this occurs, the judge's decision involves an exercise of discretion because the law poses no obligation to decide the case one way, rather than another.

The second approach is that of Ronald Dworkin.¹³ As I shall explore in more detail below, Dworkin conceives of the law as involving more than the rules that have been issued by the legislature, judges, or other law-creating entities. In contrast to positivism, Dworkin conceives of a system of adjudication that operates in accordance with moral principles regarding what is just and fair.¹⁴ These legal principles are what justify the various legal rules within the system.

Many find the role that Dworkin assigns to legal principle appealing because it provides the theoretical underpinnings of a predominate

¹⁰ See Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J. LEGAL STUD. 215 (1987) (describing the trends in legal theory regarding judicial obligation and summarizing the basic difference between the responses of modern positivism and that of Dworkin).

¹¹ H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

¹² JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975).

¹³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Of course, other philosophers have forwarded similar themes: George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981); Charles Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335 (1980).

¹⁴ Some forms of positivism may incorporate a role for moral principles as well. See, e.g., HART, *supra* note 11, at 250 ("[T]he rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values . . .").

legal mode of reasoning used by law professors, lawyers, and courts.¹⁵ To illustrate this mode of legal reasoning, consider the following routine task a professor might invite her first-year law students to perform. She presents the class with a series of seemingly disparate cases. The professor then asks the class to reconcile these differences, typically by developing an explanation that can justify the results in each case.¹⁶ Often such an explanation involves the identification of a principle or principles that could justify the results in both cases, even though no case ever made reference to such a principle.

Judges must perform a similar task in a number of different contexts. A federal district court judge, for example, is bound by the decisions of the court of appeals and the Supreme Court above her. She has a responsibility to apply those decisions, when applicable, to cases that come before her. When such case law seemingly conflicts with itself, the judge bears the responsibility of reconciling the cases when

¹⁵ Even those opposed to Dworkin's account of legal principle agree with his descriptive observations regarding the prominent role that legal principle plays in the language that judges and other members of the legal community use. See, e.g., Larry Alexander & Ken Kress, *Against Legal Principles*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 279, 288 (Andrei Marmor ed., 1995), reprinted in 82 *IOWA L. REV.* 739, 748 (1997) ("[The force of Dworkin's account of legal principles] comes from how well it tracks the standard methodologies of legal scholars, advocates, and judges.").

¹⁶ For example, the professor may ask the class to consider two examples of negligence. In the first case, a driver violates a statute that requires the use of headlights while driving at night and crashes into another car. The victim sues and wins, using the violation of the statute as strong evidence of negligence. In the second case, an unlicensed chiropractor provides treatment for a patient's disease, violating a statute that required a medical license for diagnosis and treatment. The patient later suffers from paralysis and sues her chiropractor. Unlike the first case, the court finds that violation of the statute does not constitute evidence of negligence. The cases seem at odds with each other because both involve violations of statutes, but only in the first case does the court permit the jury to use this as evidence of negligence. The professor asks the law student to provide and defend some principle that justifies both cases, despite their apparent differences. One might argue that violation of a safety statute should only count as evidence of negligence if it has direct bearing on the injury. In the first case, violation of the requirement to use one's headlights at night has direct bearing on the accident that occurs. But in the second case, one might argue that violation of the licensing statute does not have direct bearing on the injury because it is possible that the chiropractor treats the patient with the care and skill that would have been exercised by a qualified practitioner. The goal is to articulate a principle, operating at a more general level than the decision of either case, which not only resolves the differences between the cases, but also justifies the results. These two hypothetical cases are based on *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939), and *Brown v. Shyne*, 151 N.E. 197 (N.Y. 1926). When I was a first-year law student, my torts professor called on the class to perform this exercise.

possible before determining that some subset of them were wrongly decided.

B. *Hart and Judicial Discretion*

Imagine that a state legislature enacted the following statute: "All owners of motorcycles must obtain a proper license for their vehicle. Failure to do so will result in a \$250 fine." The vast majority of the time, one would have no uncertainty about the application of this rule to a particular case. Harley-Davidsons are model examples of vehicles to which the statute applies, whereas cars and trucks clearly fall outside its scope. But even such a plain and unambiguous statute leaves open the possibility of a case where the proper application of the rule remains uncertain. A moped might, for example, prove a borderline case. In some respects it resembles a motorcycle, but unlike a motorcycle, a moped cannot travel at high speeds. One might wonder whether a moped should be classified as a "motorcycle" for purposes of analysis under the state's law.¹⁷ A judge confronted with the citation of a moped owner will find little guidance in the statute as to its applicability to such a case.¹⁸

According to Hart's account, such an example demonstrates what he calls the "open texture" of the law.¹⁹ A general rule, like the statute above, is such that it cannot anticipate every concrete particular case; it is inevitable that uncertainties will arise about how to apply the rule in some cases.²⁰ At some point, the application of a rule will prove indeterminate, or as Hart terms it, "open textured."

Generally, a rulemaking body faces two handicaps. First, a rule cannot anticipate every possible scenario to which it is intended to apply, as was the case in the moped example. Second, a rulemaking body has an "indeterminacy of aim."²¹ Hart gives an example of a rule prohibiting a person from bringing a vehicle into the park.²² Ostensibly, the general aim of this rule is to achieve peace in the park, and the aim is determinate with regard to clear cases such as cars or trucks. But given such an aim, the rule is indeterminate with regard

¹⁷ See, e.g., FLA. STAT. ANN. § 320.01(27)–(28) (West 2003) (distinguishing a "motorcycle" and a "moped" on the basis of whether or not the moped has "pedals to permit propulsion by human power").

¹⁸ For a similar example, see HART, *supra* note 11, at 126.

¹⁹ *Id.* at 128.

²⁰ *Id.* at 126–28.

²¹ *Id.* at 128.

²² *Id.*

to an unenvisaged borderline case, such as a remote control toy car.²³ A question exists as to whether some degree of peace should be sacrificed in light of the interests of those who play with the toy cars in the park.²⁴ To the extent that the general aim of the rule does not dictate how to handle such a borderline case, Hart concludes that its purpose is indeterminate and that resolution of such a case will provide an opportunity to render more definite the initial aim.²⁵

The question that I would like to focus on for the moment is the extent to which the open-textured nature of legal rules allows for—or even requires—judicial discretion. According to Hart's view, examples such as the moped or the toy car in the park suggest that certain cases that are legally unregulated will arise, meaning that no decision is dictated by the law.²⁶ To that extent, the law is incomplete. As we shall see below, this situation, in which no settled rule of law disposes of a particular case, is what Dworkin refers to as a "hard case[]." ²⁷ When encountering such a case, Hart envisions the judge acting in a limited law-creating capacity, filling those gaps in a quasi-legislative manner.²⁸

Hart addresses three criticisms that Dworkin levels at such a view of judicial discretion. First, Dworkin claims that Hart's account is descriptively false.²⁹ That is, Dworkin charges that Hart's account fails to appreciate how the different Anglo-American legal systems actually function. As evidence, Dworkin observes that, in hard cases, judges do not literally speak as if creating new law. Instead, they reason by analogy to relevant principles in other areas of the law.³⁰ The language that judges use suggests that they merely enforce preexisting law, rather than create new law and apply it retroactively.³¹

Hart responds to Dworkin's charge by dismissing this evidence as mere ritualistic language that camouflages the legislative-like capacity

²³ *Id.* at 129.

²⁴ *Id.*

²⁵ *Id.* at 132-33.

²⁶ *Id.* at 272.

²⁷ DWORKIN, *supra* note 13, at 81.

²⁸ See HART, *supra* note 11, at 132 (likening judicial decision making to administrative rulemaking).

²⁹ See DWORKIN, *supra* note 13, at 81 (denouncing legal positivism as an "inadequate" theory); HART, *supra* note 11, at 273 (listing Dworkin's criticisms, including the charge regarding "false description of the judicial process").

³⁰ DWORKIN, *supra* note 13, at 81; HART, *supra* note 11, at 273-74.

³¹ DWORKIN, *supra* note 13, at 81, 89; HART, *supra* note 11, at 273-74.

that judges assume in unregulated cases.³² That is, he grants that judges may use language that suggests that they only enforce preexisting law, appearing as though prior law necessitates their conclusions. Nonetheless, use of such language is merely the custom of the trade, and not necessarily indicative of what judges are really doing, especially when confronted with a hard case.³³ Reasoning by analogy to a relevant area of the law is one such customary technique that gives the illusion that the law entails the judge's conclusion. Hart maintains, however, that such reasoning could potentially support deciding a case either way and that the judge merely acts as would a "conscientious legislator," attempting to do what is best given the previously established priorities within the law.³⁴

Second, Dworkin charges that Hart's account of judicial discretion supports an undemocratic form of lawmaking.³⁵ That is, lawmaking should be entrusted to those elected to do so—namely, members of the legislature—and not to judges who are typically not elected. Hart responds that whatever lawmaking capacity judges have is limited.³⁶ Such a restricted power of lawmaking is a small price to pay to avoid the alternative inconveniences, such as sending every case exemplifying some element of open texture to the legislature for resolution.³⁷

Third, Dworkin claims that Hart's account of judicial discretion is unjust because it is a form of *ex post facto* lawmaking.³⁸ That is, the judge not only creates law in legally unregulated cases, but also applies it to the current controversy after the fact. One might think this practice is unfair because it disappoints the justified expectations of the parties who assumed they would be regulated by the existing law in place at the time of their acts.³⁹ To apply newly created law to previous acts upsets this expectation of the parties. Hart responds that this objection is irrelevant in the context of hard cases because they represent instances where the law is entirely unregulated, where there is no clear state of law on which to build justified expectations.⁴⁰ Because the parties could not have reliably anticipated the new law that the

³² HART, *supra* note 11, at 274.

³³ *Id.* at 274-75.

³⁴ *Id.* at 275.

³⁵ DWORKIN, *supra* note 13, at 84-86; HART, *supra* note 11, at 275.

³⁶ HART, *supra* note 11, at 275.

³⁷ *Id.*

³⁸ DWORKIN, *supra* note 13, at 81; HART, *supra* note 11, at 276.

³⁹ DWORKIN, *supra* note 13, at 86; HART, *supra* note 11, at 276.

⁴⁰ HART, *supra* note 11, at 276.

judge applies retroactively, its application violates no expectations of the parties.

If one accepts Hart's rejection of Dworkin's retroactivity charge, one still must confront the question of what standards the judge should use when deciding a legally unregulated case. Hart admits that flipping a coin would constitute an inappropriate abdication of judicial responsibility.⁴¹ After all, one of a judge's responsibilities is to issue a judgment comprised of reasons supporting the decision.⁴² Hart suggests that a judge might decide the case in a way that best conforms to other areas of law. Thus, principles that justify one area of the law could be applied to the present case, even if they are not binding.⁴³ Although this sounds somewhat like Dworkin's position (discussed below), Hart takes a substantially different conceptual path. According to Dworkin, judges are bound equally by legal principles and legal rules.⁴⁴ By contrast, Hart conceives of principles as standing outside of the law; a judge can rely on them to reach a result in a hard case, but they do not compel her to reach a decision either way.⁴⁵

Dworkin's normative account of judicial discretion eliminates the quasi-legislative role that Hart would have judges assume when confronting hard cases. Rejecting Hart's account, Dworkin says that "[i]t remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively."⁴⁶ In the context of hard cases, one might wonder how a judge could determine what the parties' rights entail when the applicable rule of law does not supply an answer. To resolve such an inquiry, Dworkin places heavy emphasis on the role of legal principles.⁴⁷ To understand

⁴¹ See *id.* at 273 (stressing that judges should not exercise their lawmaking powers arbitrarily).

⁴² *Id.*

⁴³ *Id.* at 274-75.

⁴⁴ DWORKIN, *supra* note 13, at 37-38.

⁴⁵ HART, *supra* note 11, at 272-73.

⁴⁶ DWORKIN, *supra* note 13, at 81.

⁴⁷ Scholars routinely single out Dworkin as the most influential proponent of the importance of legal principles in legal and jurisprudential reasoning. See, e.g., Alexander & Kress, *supra* note 15, at 739 ("Dworkin's jurisprudential theory . . . is the most powerful extant theory that builds upon legal principles . . ."); Michael S. Moore, *Legal Principles Revisited*, 82 IOWA L. REV. 867, 867 (1997) ("Dworkin's treatment [of legal principles] was systematic and even in places elegant[, and he] . . . has stated the problem for our generation in the way that Langdell, Cohen, Levi, and Fuller did for theirs."); Stephen R. Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787, 807 (1997) ("The most powerful advocate of the thesis that legal principles have a role to play in law and legal reasoning has been Ronald Dworkin."); Jeremy Waldron, *The Need for Legal Principles*, 82 IOWA L. REV. 857, 857-58 (1997) (stating that Dworkin offers the

Dworkin's rejection of Hart, one must determine what kind of judicial discretion Hart embraces that Dworkin does not.

C. *What Kind of Discretion?*

To evaluate Hart's claim that judges have discretion, Dworkin distinguishes between three different kinds of discretion and asks into which category Hart's version of discretion falls.⁴⁸ First, there is a weak sense of discretion, meaning simply that a judge cannot always apply the pertinent standards mechanically and produce a decision, but sometimes must use her judgment.⁴⁹ In the child custody setting, for example, a judge may have to decide what is "in the best interests of the child."⁵⁰ While such a determination may prove difficult, the judge only has discretion in the sense that the standard does not automatically produce an answer, but rather requires judgment.

A second weak sense of discretion, according to Dworkin, arises in cases where a judge's decision is not reviewable.⁵¹ The Supreme Court, for example, exercises discretion in this sense because there is no higher court that could potentially overturn its decisions.

Lastly, Dworkin describes a third, stronger sense of discretion where a judge is "simply not bound by standards set by the authority in question."⁵² This sense of discretion does not deny that there are rules and principles that purport to bind judges. Rather, it posits that in many cases those rules and principles are so vague and difficult to apply that, in actuality, they fail to bind judges at all.⁵³ Under this stronger sense of discretion, no rule or principle binds the judge because the law fails to dictate a right answer. This does not mean, however, that the judge is free from criticism on other grounds, such

best-known theory of the relationship between legal principles and moral principles, as well as of moral reasoning).

⁴⁸ See DWORKIN, *supra* note 13, at 31 ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept.").

⁴⁹ *Id.*

⁵⁰ The "best interests of the child" standard remains the modern test for analyzing child custody disputes. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 805 (1998).

⁵¹ DWORKIN, *supra* note 13, at 32.

⁵² *Id.*

⁵³ *Id.*

as an allegation that the decision is unfair or economically inefficient.⁵⁴

Considering what we know of Hart's account of legal rules, judges have, at least on some occasions, discretion in all three senses. The open texture of rules at the very least requires judges to exercise discretion in the first weak sense.⁵⁵ That is, a rule will not always obviously or mechanically resolve a particular case, but may require careful judgment. Hart also would not contest the second sense of discretion, that the decisions of courts of the highest level are not reviewable. The fact that judges descriptively have these kinds of weaker discretion is obvious. Equally undisputed is that they should. Dworkin agrees that judges have discretion in the weaker sense.⁵⁶

The heart of the disagreement centers on whether judges should have discretion in the stronger sense.⁵⁷ Dworkin offers a fundamentally different view of the law than Hart's breed of positivism. Dworkin believes that judges should not have this third, stronger kind of discretion.⁵⁸ Let us consider in the next Section one powerful argument that Dworkin poses against the stronger sense of discretion.

D. *Strong Discretion and Precedent*

It is not unusual for the Supreme Court to reject an earlier decision it made or prior reasoning it employed.⁵⁹ Since judges are bound by rules in Hart's view, one might wonder where they get the power to change them. To formulate this concern another way, if judges have discretion in the strong sense to change established rules, then these

⁵⁴ See *id.* at 33 ("The strong sense of discretion is not tantamount to license, and does not exclude criticism.").

⁵⁵ *Id.* at 31-32.

⁵⁶ See *id.* at 38 ("[T]he positivists' theory of judicial discretion is . . . trivial [if] it uses 'discretion' in a weak sense . . .").

⁵⁷ This disagreement really poses two questions, one descriptive and one normative. The first question asks whether some particular judges, such as American judges, actually have strong discretion in the legal system as it stands. The second question concerns whether they should. I shall focus on the latter.

⁵⁸ DWORKIN, *supra* note 13, at 37.

⁵⁹ *Brown v. Board of Education*, 347 U.S. 483 (1954), stands out as a rejection of a previous line of cases and is a decision to which we shall return later. *Erie Railroad v. Tompkins*, 304 U.S. 64, 77-78 (1938), is one of the most famous examples of the Supreme Court's rejection of entrenched statutory interpretation. In *Erie*, the Court rejected its previous one-hundred-year-old statutory interpretation of the Rules of Decision Act, 28 U.S.C. § 1652 (2000), finding that the word "law" as used in the statute included the common law. 304 U.S. at 77-78.

rules seemingly would not be binding on them.⁶⁰ A positivist such as Hart must explain how a judge can have the power to reject a rule while at the same time being bound by it.⁶¹

One possibility is for the positivist to deny that judges should have the power to reject precedent. Such a system is undesirable, though, because of the value of expunging outmoded rules—which were justified by now-rejected values—from our legal system. Without such ability, the Court could not have ruled as it did in a case like *Brown v. Board of Education*,⁶² but would have needed to continue applying the “separate but equal” doctrine.⁶³ That is, such a system would not allow any judicial mechanism for correcting rules that were generated by reasoning now deemed faulty. Moreover, such a rigid structure would command complete deference to those who previously decided the issue. This is a topic to which I shall return later, but for now, suffice it to say that a vigorous system of adjudication must allow for some principled accommodation of different viewpoints. Complete deference would serve only to lock in the opinions of the past.

Alternatively, the positivist could argue that additional rules, dictating whether prior reasoning should stand or fall, could solve this dilemma. The legislature, for example, could enact a statute that prohibits judges from rejecting prior reasoning except under some specified set of circumstances. Let us call such a set of rules, *RRPR*—“rules for rejecting prior reasoning.” Even with *RRPR* in place, Hart would concede that the open nature of rules would inevitably lead to a case where *RRPR* did not dictate whether some bit of prior reasoning—namely, an established rule—should stand or fall. Let us call such a case, *BC*, standing for “borderline case.” *BC* is an instance of prior reasoning that establishes a rule for which *RRPR* does not dictate whether or not a judge should reject it. As we have seen, when a rule does not automatically dictate an answer, the judge has discretion

⁶⁰ DWORKIN, *supra* note 13, at 37.

⁶¹ For clarity's sake, I want to emphasize the difference between the strong sense of discretion and the power to reject a rule. Recall the motorcycle statute, *supra* note 17 and accompanying text. We have seen that, in Hart's view, a judge confronted with the case of a moped will have strong discretion to determine whether or not the motorcycle statute should apply. Even if the judge determines that the motorcycle statute should not apply, such a holding does not amount to an outright rejection of the statute. The statute still regulates the majority of cases that do not exhibit any element of open texture.

⁶² 347 U.S. at 495.

⁶³ *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), established the “separate but equal” doctrine, which remained good law until *Brown*. The overruling of *Plessy* also receives mention *infra* notes 131-32, 134 and accompanying text.

in the strong sense to decide. That is, despite the presence of *RRPR*, cases such as *BC* will arise for which the rule does not supply an answer, leaving the judge strong discretion to reject the rule as she wishes. This, however, leaves the positivist back in the predicament that hypothesized rules such as *RRPR* were meant to prevent: a judge in a position to exercise strong discretion to reject a rule that should have binding effect on her.

The positivist might then argue that, if rules cannot do the trick, perhaps principles can. As we have seen, a major conceptual difference between positivists and Dworkin is that the former regard principles as extra-legal in the sense that they do not bind judges. But if they are not binding, then a judge has the freedom, or strong discretion, to decide whether the prior reasoning should stand. Thus, Dworkin argues that failure of the aforementioned alternatives forces the positivist to adopt standards or principles that are not extra-legal but binding on judges.⁶⁴ Such principles would remove strong discretion when it comes to precedent, dictating whether a judge may reject an established rule.⁶⁵ We have come far enough now that we must examine the nature of legal principles and how they differ from legal rules to make sense of Dworkin's claim.

E. *Rules vs. Principles*

Unlike principles, rules are "applicable in an all-or-nothing fashion."⁶⁶ Recall our earlier example of the motorcycle statute.⁶⁷ As a rule, the statute requires all motorcycle owners to obtain a proper license. If the conditions of the rule are met, then the rule must be applied. Therefore, if there is a motorcycle owner without a proper license, a penalty is undoubtedly appropriate. Alternatively, if the conditions are not met—for instance, if the vehicle in question is a car—then the rule should not be applied.

Principles, on the other hand, do not operate in such a conclusive fashion. Instead, principles possess an element of weight.⁶⁸ To understand what this means, consider the following example that Dworkin

⁶⁴ DWORKIN, *supra* note 13, at 46.

⁶⁵ *Id.* at 37-39.

⁶⁶ *Id.* at 24.

⁶⁷ *Supra* notes 17, 61 and accompanying text.

⁶⁸ See DWORKIN, *supra* note 13, at 26 ("Principles have a dimension that rules do not—the dimension of weight or importance.").

provides: "No man may profit from his own wrong."⁶⁹ Such a principle does not set out the conditions under which it will be satisfied, but merely provides a reason to argue in favor of one particular conclusion.⁷⁰ Nevertheless, in interpreting a principle, one must weigh the outcome of its application against the results suggested by other relevant and potentially contradictory principles.⁷¹ For example, when considering the appropriateness of restrictions on door-to-door solicitations, a judge should balance the principle that "free speech should be protected" against the principle that "privacy of the home is sacred." Balancing all relevant principles should produce the appropriate conclusion.⁷²

While multiple principles may apply simultaneously, multiple rules may not. If two rules conflict in a particular situation, only one of them can apply, and the decision as to which is valid must come from considerations outside of the rules themselves.⁷³

Additionally, a principle is concerned with what is fair or just, incorporating some dimension of morality.⁷⁴ Such an element is not essential to a rule. Legal principles, insofar as they are morally correct, are a subset of moral principles, demarcated by their justificatory relationship to the extant law.⁷⁵ That is, legal principles serve to justify some set of settled law, and as I have discussed, judges rely on those principles to decide hard cases. Sometimes judges incorrectly identify these principles, and other times they incorrectly apply them—such a difficult task does not provide for any easy answers. Consequently, judges make mistakes and disagree with each other in determining the proper principles and how to balance them.

For example, the majority in *Roe* relied on a legal principle that recognized the right of privacy.⁷⁶ Specifically, the Court argued that the principles underlying earlier privacy decisions, such as *Stanley v.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 26-27.

⁷² See Perry, *supra* note 47, at 788 (arguing that the overall balance of principles, which are "commensurable and capable of being aggregated, along their dimension of weight, . . . yield[] an overall conclusion about what ought to be done").

⁷³ DWORKIN, *supra* note 13, at 27.

⁷⁴ *Id.* at 22.

⁷⁵ *Id.* at 22-29; see also Alexander & Kress, *supra* note 15, at 744 ("In a mature, decent legal system, we should expect significant overlap between the classes of legal and moral principles, but neither identity between nor subsumption of one class under the other.").

⁷⁶ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

Georgia,⁷⁷ should be applied in the context of abortion.⁷⁸ Opponents of the *Roe* decision, if operating within the Dworkinian framework of legal principle, must explain why the Court should have relied on different principles that do not permit abortion and that reflect a better understanding of the Constitution and pertinent case law.⁷⁹

Another difference is that principles can justify a rule, but a rule cannot justify a principle.⁸⁰ For example, *Roe* held that a woman may obtain an abortion subject to the medical judgment of her physician.⁸¹ The Court justified this rule by balancing the principles governing a woman's right to privacy against the state's interest in protecting potential life during the first trimester. The relationship between the principles and the rule is not reciprocal. The rule cannot justify this balance of principles.

Now that we have a better understanding of the characteristics of legal principles and how they differ from rules, we are in a better position to understand the role they play in determining whether a judge must reject precedent.

II. THE ROLE OF CONFIDENCE IN THE REJECTION OF PRECEDENT

A. *Principles and Precedent*

I will start by making a distinction between first- and second-order legal principles, generally following Stephen Perry's lead.⁸² First-order legal principles are those substantive principles that a judge weighs against one another, the ultimate balance of which will determine the appropriate resolution of a case. Simply put, first-order legal principles are reasons used in deciding the merits of a case. For example, the principle that "the government should not violate the privacy of the bedroom" is a first-order principle.

⁷⁷ 394 U.S. 557, 564 (1969) (considering the importance of the principle that one should "be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy").

⁷⁸ *Roe*, 410 U.S. at 152-53; see also RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 54 (1996) (discussing how the *Roe* Court "argue[d] that the principles latent in the earlier privacy decisions about sterilization and family and contraception must be applied to the abortion case as well").

⁷⁹ DWORKIN, *supra* note 78, at 54.

⁸⁰ See Perry, *supra* note 47, at 788 ("Principles can justify rules, but not vice versa.").

⁸¹ 410 U.S. at 163-64.

⁸² For a discussion of the interplay between practical reason and precedent, see Perry, *supra* note 47, at 797, as well as Perry, *supra* note 10, at 219-23.

Second-order legal principles provide reasons for how a judge should balance one first-order principle in relation to others. That is, a second-order principle suggests how a judge should weigh first-order principles. Consider the following example of a second-order principle: "A legal principle deriving from a historically older case that has never been overturned should be given more weight than a principle derived from a substantially more recent case."⁸³ As this example demonstrates, a second-order legal principle does not help one decide how to resolve the substantive issue of a particular case—should women have the right to abortion?—but instead helps one decide the extent to which the first-order legal principles will be relevant and useful in answering that question.

Using this terminology, consider what a judge hopes to accomplish when rejecting precedent. Usually, she would like to replace the old balance of first-order legal principles, as applied to a specific area of law, with what she believes is a more justified balance of first-order principles. This new balance might include introducing new principles, or it might simply involve reweighing the principles of the old balance. The simplest form of rejection of precedent is when a judge would like to replace first-order principle *X* with the first-order principle *not-X*. For example, in *Brown v. Board of Education*, one might describe the Court's actions as the rejection of the principle "separate but equal."⁸⁴

A judge may not reject precedent, however, merely because she disagrees with it. Even the Supreme Court must obey certain standards that dictate when it is appropriate to reject prior reasoning.⁸⁵ In its most general form, the doctrine of *stare decisis* reflects the notion

⁸³ An example of this principle in practice is *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809), which many torts textbooks still use to demonstrate the basic doctrine of contributory negligence even though it is now almost 200 years old. One should give more weight to the principles justifying this case than a conflicting principle derived from a more recent case.

⁸⁴ See 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place."). For another remark about the implications of *Brown*, see *infra* notes 132, 134 and accompanying text.

⁸⁵ One such standard is the doctrine of legislative supremacy. See, e.g., *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962) ("[W]e have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers."). This doctrine requires the court to give a certain amount of deference to the legislature. This is a standard that Dworkin considers in the context of overturning precedent. DWORKIN, *supra* note 13, at 37-38.

that judges should give an appropriate degree of deference to prior reasoning.⁸⁶

Deference to prior reasoning serves at least two functions. First, it allows for predictability, enabling members of the general population—the pool of would-be litigants—to form concrete expectations regarding how the law will treat their actions. Predictability takes on greater importance in certain contexts, such as voluntary transactions (e.g., contracts), than it does in other contexts, such as involuntary transactions (e.g., torts).⁸⁷ In an area of the law like torts, which governs involuntary transactions, a judge may give less deference to precedent because predictability serves a less important purpose in that context.⁸⁸

Second, precedent provides stability to a legal system.⁸⁹ When a court rejects what formerly had been the accepted balance of principles in an area of law, this can have a ripple effect into other areas. For example, a substantial revision of contract law could have effects in tort law. The easier a legal system makes it for judges to reject precedent, the more unstable the legal system becomes.

In our common law tradition, there are many standards dictating when it is appropriate to reject prior reasoning. Such standards are examples of second-order legal principles.⁹⁰ They provide guidance for choosing among competing principles—namely, those first-order principles embodied in the precedent and those first-order principles with which the judge would like to replace the former first-order principles. These second-order principles do not themselves suggest how the judge should resolve the substantive issues of the case.

I would like to note here, as it will be important for subsequent discussion, that judges may disagree about the proper balance of both first- and second-order principles. For example, judges may differ

⁸⁶ Perry, *supra* note 10, at 241, defines the doctrine in this manner: [R]elative weight . . . assigned to [a] given proposition of law [is generally] a complex function of many different factors, including the position . . . of the courts that have relied upon the proposition in the past, the number of times that it has been so relied upon, and the age of the relevant precedents.

⁸⁷ *Id.* at 249.

⁸⁸ *Id.*

⁸⁹ See, e.g., *id.* at 250 (explaining that, when the justification for a decision is so entrenched in the “interlocking network of dispute-settling procedures,” courts should be limited in their “capacity to make an immediate, sweeping change in the settled law” by overruling such a decision).

⁹⁰ For our purposes, I will treat second-order legal principles as more particular iterations of the general interests of the doctrine of stare decisis: predictability and stability. These interests are discussed more below, *infra* Part II.B.

regarding the degree of deference that is appropriate in a given situation. This point is essential to understanding the dispute over *Roe* within a framework of Dworkinian principles: the majority and minority not only disagree about the substantive holding of *Roe*, but they also disagree over how much deference one should give it as precedent. That disagreement turns on the following question: What are the appropriate standards in the law that address the level of deference owed?

B. *Precedent and Mistake*

So far, I have said that the concern for predictability and stability justifies, at least in part, deference to precedent. Now I want to address the flip side of this issue, the justification for the rejection of precedent.

Because choosing between competing legal principles is extremely difficult, a legal system should frequently rethink the balance it has struck between principles and continually revisit past precedent in light of recent experience and debate. The doctrine of precedent gives added weight to prior reasoning, for reasons I have explored, but this presumption in favor of the status quo often can—and should—be overcome. A legal system allows for the rejection of precedent because it recognizes the possibility of error inherent in rendering judgments. The kind of error I am concerned with here is a mistake in balancing principles.

One should understand the doctrine of *stare decisis* as a tradeoff between predictability and stability on one side and perceived correctness on the other.⁹¹ That is, a court may reject precedent when an appropriate level of confidence that the precedent was wrongly decided outweighs the value of predictability and stability. The present Court believes that the precedent it rejects contains a balance of principles that no longer falls within an acceptable “range of moral plausibility.”⁹²

At this point, we are in a position to begin to appreciate the important role that a judge’s confidence plays in deciding whether to abide by or reject precedent. A judge weighs her level of confidence

⁹¹ See Perry, *supra* note 47, at 817 (“Legal principles represent . . . a trade-off between perceived moral correctness, on the one hand, and consistency and predictability, on the other. . . . In an epistemically nontransparent world, a trade-off of this kind is inevitable.”).

⁹² *Id.*

in the likelihood that particular precedent has been wrongly decided against the need for predictability and stability. Only when the judge's confidence is suitably high may she properly reject precedent. The question I would like to address now is what ingredients should constitute a judge's level of confidence.

C. *Confidence: What Constitutes It?*

In his partial dissent in *Casey*, Justice Antonin Scalia expressed a high level of confidence that the Constitution does not grant women a right to have an abortion.⁹³ I would like to explore the basis on which a Justice such as Scalia⁹⁴ should build such confidence.

The majority in *Roe* essentially identified two major competing principles. On one side of the balance, the Court considered a woman's right to privacy, stemming from earlier constitutional case law.⁹⁵ The Court argued that this right encompassed the right to an abortion.⁹⁶ On the other side of the balance, the Court considered the state's interest in protecting potential life, arguing that this interest grew stronger as the fetus progressed in age.⁹⁷ The Court decided the case based on what it perceived to be the relative strengths of these competing considerations.⁹⁸

The right to privacy and the interest in protecting potential life are both instances of what I have termed first-order principles. The

⁹³ For instance, Justice Scalia made this emphatic statement:

[As to] whether the power of a woman to abort her unborn child is . . . protected by the Constitution of the United States[,] I am sure it is not . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part).

⁹⁴ In *Freedom's Law*, DWORKIN, *supra* note 78, at 126-27, Dworkin argues that Scalia does not operate within the framework that the Constitution creates a system of principles. It would be a mistake, then, for one to ask how Scalia would justify his partial dissent in terms of a different balance of principle, if in fact he rejects such an inquiry as to the nature of his judicial capacity.

⁹⁵ *Roe v. Wade*, 410 U.S. 113, 152 (1973). Other principles argue in favor of this particular privacy right; as Dworkin puts it in *Freedom's Law*, DWORKIN, *supra* note 78, at 54, "These earlier privacy decisions can themselves be defended in a similar way, as part of a broader project of the Court . . . to identify and enforce the principles [that] . . . a society truly committed to individual liberty and dignity must recognize."

⁹⁶ *Roe*, 410 U.S. at 154.

⁹⁷ *Id.* at 162-64.

⁹⁸ How one should properly balance the two chief considerations here is by no means an easy task. The answers to any such moral question are far from transparent.

way a judge balances first-order principles such as these will guide the resolution of the case.⁹⁹ The strength of the balance in favor of one side should constitute the degree of the judge's confidence.

Let me illustrate with an example in the context of everyday decision making. Consider a jury member forced to decide whether or not the defendant committed the crime in question. One can imagine the following crude model of the jury member's decision-making process (to which I shall refer as the "jury member model"). She draws two columns on a piece of paper. The left-hand column contains reasons in favor of guilt, and the right-hand column contains reasons in favor of innocence. Further, the factors vary in strength. The jury member represents this numerically, ranking each reason for or against the defendant's innocence on a scale of one to ten.¹⁰⁰ Having ranked each factor, the jury member sums the relative strength of the factors in the left-hand column and then does the same for the right-hand column. She bases her belief about whether the defendant is guilty on which column has the highest number. The difference between the relative strength of each side should constitute her level of confidence in the decision she makes. For example, if the factors in favor of guilt total one hundred and the factors in favor of innocence total ninety-nine, the jury member should conclude that the defendant is guilty, but attach the lowest possible confidence to this belief. In fact, one would not expect such a level of confidence to meet the criminal law's "beyond a reasonable doubt" standard.¹⁰¹ Of course, this model is extremely crude because it assumes that one can treat reasons contributing to guilt or innocence and the attempt to balance them in such a mathematical fashion. Even so, the jury member model illustrates how the strength of the balance of reasons in favor of one position should constitute one's confidence in the decision made.

With the jury member model in place, we are in a position to understand the basis for a judge's confidence that the court reached the

⁹⁹ The process of balancing principles is a difficult task of practical judgment. In making such a determination, a judge might consider other first-order principles. She might also take into account second-order principles that help her determine how much weight to give a particular first-order principle, *supra* Part II.A.

¹⁰⁰ Of course, how the jury member should rank the relative strength of each factor will take into account other considerations, and the model would grow more complicated if it represented this reality.

¹⁰¹ This point has more general relevance for a later Section, *infra* Part II.E, in which I discuss how much confidence a judge should need to overturn precedent. In some cases, the judge may need a relatively high level, on par with what the court requires of a jury member.

wrong result in a prior case. Generally speaking, one's confidence that a court reached the wrong decision will take one of two forms.¹⁰² First, one may believe that the court correctly identified the proper principles to balance, but improperly balanced them. In this scenario, one's confidence that the precedent is erroneous will correspond with one's perception of the strength of that balance. For example, one may agree that *Roe* should have been decided by balancing the two primary interests that the Court identified. At the same time, however, one might believe that the state's interest in protecting potential life at any point after conception outweighs a woman's privacy right and, thus, that *Roe* was wrongly decided. The degree to which one believes that the interest in preserving life outweighs the right to privacy determines that person's amount of confidence.

The second form of confidence that a particular precedent was wrongly decided is based on the belief that the court did not even consider the proper principles. For example, one might not think that the right of privacy encompasses the right to an abortion. If this conclusion were correct, one could rightfully object to the Court's consideration of and heavy emphasis on that principle. In addition, one might argue that the Court should have considered certain principles that it did not, such as "the longstanding traditions of American society."¹⁰³ As one can see here, one may disagree with a precedent such as *Roe* because it weighed some factors it should not have while it failed to consider other factors that it should have. Once one weighs the factors she thinks should have been considered, the strength of that balance should constitute her confidence.

D. *Good Faith*

Recall the concern of the cynic from the Introduction.¹⁰⁴ The cynic feared that a judge could manipulate the legal arguments to support whatever result she desired. Let me rephrase this concern with the terminology I have developed: a judge will disingenuously "balance" the relevant first-order principles in such a way as to achieve any outcome she desires. The judge could rig the balance strongly in favor of one side, providing the basis for a high, but sham, level of

¹⁰² These two forms need not be mutually exclusive.

¹⁰³ This is one of Justice Scalia's considerations in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 980 (1992). See also *supra* note 93 (quoting Scalia's evocation of this principle).

¹⁰⁴ *Supra* p. 1222.

judicial confidence. To confront this charge, our account of confidence and precedent must make three assumptions:¹⁰⁵ (1) In most cases, there is a right answer to how a case should be decided; (2) judges generally have the capacity to appreciate and weigh properly the range of arguments in favor of each side; and (3) judges are capable of a good faith attempt to discern the right answer and the arguments supporting it.¹⁰⁶ I will discuss each assumption in turn.

First, regarding how a case should be decided, one must assume that some answers are better than others and that, in general, there is a right answer. This assumption does not suggest that the best arguments are easily discernible or that there will be consensus in the legal community as to how a case should have been decided.¹⁰⁷ Rather, this assumption merely rejects the skeptical view, which posits that the law does not actually dictate a right answer to a given case.

One should not rule out the possibility, however, that, in some cases, the arguments favoring each side may be evenly balanced. In such cases, literally speaking, there would not be a correct decision. Just the same, judges should approach a case as if a right decision exists, even if there may be some instances where the law does not dictate a decision for one side or the other.

Second, one must assume that judges are at least capable of grasping the right answer. That is, the possibility must exist that the judge will correctly decide a case by more than bare chance.¹⁰⁸ One should assume that judges have a certain amount of efficacy in their ability to get cases right for the right reasons and that they are capable of

¹⁰⁵ Dworkin's theory of adjudication generally makes all three of these assumptions for all cases in the law. DWORKIN, *supra* note 13, at 46-80. Of course, other conceptions of the law might not make these assumptions. As we have seen, positivists such as Hart would reject the first assumption in the context of hard cases. That is, Hart would say that the law is indeterminate when a legal rule does not provide an answer, meaning that there is no right way the case should be decided. HART, *supra* note 11, at 126-29. If a rule had clear application to a case, however, Hart might make all three assumptions in that limited circumstance.

¹⁰⁶ I would like to acknowledge the help I received from Professor Stephen R. Perry in formulating these three assumptions.

¹⁰⁷ See, e.g., Brian Leiter, *Law and Objectivity*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 969, 977 (Jules Coleman & Scott Shapiro eds., 2002) (discussing two possible dimensions of objectivity in the law, the first of which corresponds to my first assumption: "[First,] [t]he law is *metaphysically* objective in so far as there exist right answers as a matter of law").

¹⁰⁸ This second assumption corresponds with the second dimension of objectivity Brian Leiter discusses. See *id.* at 977 ("[Second,] [t]he law is *epistemically* objective in so far as the mechanisms for discovering right answers (e.g., adjudication, legal reasoning) are free of distorting factors that would obscure right answers.").

grasping the range of reasonable arguments relevant to a given case. The phrase "range of reasonable arguments" connotes that a judge can forward more than one possible argument in good faith. Within that range are conflicting positions, and accordingly, judges may disagree about how best to resolve a particular case. This second assumption requires, however, that judges have the capacity to appreciate and operate within such a range.

The second assumption also presupposes that other impediments, such as a set of subconscious motivations that would hamper a judge's ability to discern the right answer, do not exist. On a more general level, as Brian Leiter has noted, a judge's process of weighing the relevant arguments must not involve "distorting factors" with the potential to "obscure right answers."¹⁰⁹ To take the position that a judge could not overcome such subconscious motivations, or distorting factors more generally, would be to succumb to a form of skepticism. This particular skeptical concern supposes that there is a right answer as to how a given case should be decided, but that such subconscious barriers to a judge's capacity to weigh the relevant arguments prevent the judge from discerning it. But to accept this concern as insurmountable from the perspective of Dworkin's theoretical framework would be to throw one's hands in the air in defeat. The theoretical hope that a judge can appreciate the relevant range of arguments in an effort to properly decide a case rests on an assumption that rejects this kind of barrier to a judge's capacity to reason.

The first two assumptions say that there is most often a right answer to a case and that the judge has a capacity to appreciate the arguments that support it. The third and final assumption requires that the judge try her best, making a good faith effort, to *use* her capacity to discern those arguments that support how the case should be decided. If a judge only decides cases in a way that advances her political agenda, then the first two assumptions would matter little, and the charge of the cynic would remain. Ultimately, a judge may vote the way she would have if she had been motivated solely by *realpolitik*. But this outcome is not problematic so long as she actually believes, having made a good faith effort, that the law dictates this result.

It may be worth taking a moment to consider how one should understand a judge's political beliefs and the relation of these beliefs to the decision-making process. It may be conceptually possible to understand one's political beliefs, most sympathetically, as justified

¹⁰⁹ *Id.*

through a considered balance of first-order principles, albeit not legal ones. That is, one's set of political beliefs is a reflection of a reasoned attempt to consider the reasons for and against such a view. Nonetheless, the principles underlying the law might not correspond with the reasons that justify one's political views. Thus, the judge must take care not to import into the law the reasons she has for her own beliefs. This is an especially hard demand when the law calls upon the judge to determine what is essentially a moral question, such as whether the liberties the Constitution protects include the right to abortion.

If one accepts these three assumptions, one need not fear that a judge will develop a level of confidence based on a sham consideration of the law. I should make clear, however, that these assumptions will hardly guarantee agreement among judges. It is an extremely challenging task to figure out the proper balance of principles required to resolve a hard case. It is quite possible that two judges, both having made a good faith effort, will disagree about the proper resolution of a case.

E. *Confidence: How Much Is Enough?*

In the few previous Sections, we have explored what should constitute confidence. We have seen that it consists in substantive considerations about the proper balance of the relevant first-order principles.¹¹⁰ Also, I have responded to the cynic by presenting the assumptions necessary to defuse the concern that the judge's confidence could take its strength from sham reasoning.¹¹¹ Now we are in a position to ask the second part of our question concerning confidence: How much of it is enough to overturn precedent? Recall the statement that precedent represents a balance between stability and predictability on the one hand and correctness on the other.¹¹² Suppose that a judge has determined, in good faith, that she disagrees with some precedent and now must decide whether to overturn it. The crucial question that the judge must answer, then, is whether the precedent no longer falls within an acceptable range of correctness, to the extent that rejecting it outweighs the damage such rejection causes to the legal system's stability and predictability.

As we have seen, however, the judge's confidence in the suitability of some precedent is a matter of degree. That is, a judge may believe

¹¹⁰ See *supra* pp. 1238-41 (employing examples to assert this proposition).

¹¹¹ *Supra* Part II.D.

¹¹² *Supra* note 91 and accompanying text.

that a previous case was wrongly decided, but only have marginal confidence in this belief. Now we are in a position to see, in general terms, what is required for a judge¹¹³ to reject precedent. The judge must determine, with a sufficient degree of confidence, whether the precedent no longer falls within an acceptable range of correctness. I will next address the considerations that factor into what should constitute that sufficient degree.

As I have already explored and reiterated in this Part, precedent serves the interests of predictability and stability. I would like to treat these two interests as principles in themselves relevant to resolution of the case.¹¹⁴ The question that I would like to examine now is whether one should treat the interests of predictability and stability as first- or second-order principles. As we will see, these paths of analysis, for the most part, are really two sides of the same coin. Even so, I will argue that treating the interests of stability and predictability as a second-order operation provides for a more sophisticated basis on which the demands of precedent can work.

If one treated predictability and stability as first-order principles, one would balance them along with the other relevant first-order principles in deciding the merits of the case. Let us take *Roe* as an example, using the crude jury member model I developed earlier. Suppose that a Supreme Court Justice must consider the question of whether a woman has the right to an abortion. On one side, she weighs the first-order principles in favor of this right. To reiterate, this process would at least include examining the following: (1) the value of a woman's right to privacy; (2) the force of previous case law, particularly the line of cases expounding upon one's constitutional right of privacy; and (3) textual support in the Constitution itself for determining that the right of privacy encompasses the right to abortion.¹¹⁵ If one understands the interests of predictability and stability as first-order principles, then the Justice should include them on this side of the balance. Of course, the weight she should assign to those

¹¹³ I am assuming here that the judge is of sufficient authority within the judicial hierarchy to entertain the rejection of precedent.

¹¹⁴ I state this at its most general level. When actually applying these principles to a case, only some more specific iteration of the general principle of stability or predictability may be relevant. For instance, the only applicable principle of stability that may apply could be an example I used earlier: "A legal principle deriving from a historically older case that has never been overturned should be given more weight than a principle derived from a substantially more recent case." For the first use of this example, see *supra* text accompanying note 83.

¹¹⁵ *Supra* text accompanying notes 95-96.

interests will depend on a number of other factors. These include how much people have come to rely on *Roe*, as well as the potential damage to the stability of the legal system if *Roe* were overturned. On the other side of the balance, the Justice weighs the principles in favor of rejecting such a right. Thus, on one side, there are the first-order principles and their relative weights, including the force of predictability and stability. On the other side, there are the first-order principles weighing against the right.

The consequence of this analysis is that a judge, in order to arrive at the conclusion that *Roe* should be rejected, must outweigh not only the principles in favor of the right, but also the additional weight gained from the interests of predictability and stability. Understanding the operation of *stare decisis* in this way, the amount of confidence that a judge needs to overrule the precedent must be more than: (1) the strength of the principles in favor of the precedent, combined with (2) the weight of the interests of predictability and stability on the side of the precedent.

As a second conceptual possibility, one could treat the interests of predictability and stability as second-order principles. As I have said, second-order principles provide guidance for how a judge should weigh first-order principles.¹¹⁶ Understood this way, predictability and stability function as guides that instruct the judge to assign more weight to the first-order principles justifying the precedent.

For a judge in a position to reconsider a case like *Roe*, these two second-order principles would instruct her to give more weight to the reasoning of the *Roe* majority¹¹⁷ than if she were considering the matter *de novo*. To put it another way, consider again the jury member model.¹¹⁸ Under the conceptual framework of that model, the judge would list in each column, so to speak, the first-order principles and their relative weights according to which side of the merits they support. The second-order principles of predictability and stability operate in such a way as to increase the relative weights of the considerations that would be placed in the left column. Thus, the judge would attribute more weight to each first-order principle in favor of the right to abortion than she would have otherwise. The amount of confidence the judge would need to overturn the precedent, then, would

¹¹⁶ *Supra* p. 1236. I should note here that the strength of predictability and stability as second-order principles could vary from instance to instance.

¹¹⁷ Here, the relevant reasoning of the *Roe* majority is how it articulated and balanced the particular first-order principles.

¹¹⁸ *Supra* p. 1240.

have to exceed the strength of the principles in favor of the precedent. In this way, the status quo gains a certain strength that it would not otherwise possess.

Stephen Perry offers an additional consideration for the second conceptual view, for which he has argued under certain circumstances. In general, Perry argues that the practice of *stare decisis* takes place through the operation of second-order principles.¹¹⁹ Even so, he argues that “once a practice of following precedent is in place, there may be a kind of feedback effect: the justified expectations and the reasonable reliance to which the practice gives rise are first-order reasons that should indeed be taken into account in the overall balance of principles.”¹²⁰

The consequences of the second conceptual approach, then, would be as follows. First, second-order principles will function parasitically on the first-order principles, increasing the weight of these first-order considerations in favor of the precedent.¹²¹ Second, the empirical question of whether people have come to rely on the precedent is a first-order consideration. That is, whether or not people have actually come to rely on the precedent should make a difference in analyzing the strength of the precedent.

In sum, we have two strong lines of analysis by which we can understand the operation of stability and predictability. In many respects, each accords precedential reasoning added weight. In their purpose, then, they do not differ. Even so, I now would like to argue that the better of the two is the second conception, which treats the two interests strictly as second-order principles. This method allows us to consider, for every first-order consideration, how much additional weight that particular factor should receive from the two second-order interests. That is, it instructs the judge to consider, one by one, the increase in weight that stability and predictability give to each factor. This additional inquiry allows for a more nuanced operation of the

¹¹⁹ See Perry, *supra* note 47, at 800 (“The only plausible justification that can be offered for a judicial practice of following precedent will look to the rule-of-law values [predictability and stability], and in a legal system based on summary rules those values take effect, I have argued, through the operation of second-order principles.” (footnote omitted)).

¹²⁰ *Id.*

¹²¹ This proposition represents my understanding of Perry’s suggestion in the lexicon that I have developed.

interests. The first conception, by contrast, offers no such opportunity to adjust the weight of each factor.¹²²

F. *Judicial Disagreement at the Second Level*

We have seen that judges, even when they operate in good faith, can disagree over the proper balance of the relevant first-order principles, as well as over the determination of which principles are relevant in the first instance. Disagreement is not contained there. Judges may also disagree about how to apply the relevant second-order principles and about which ones are even appropriate to consider. In the previous Section, I offered an account of the doctrine of precedent in terms of second-order principles. Disagreement over second-order principles in the context of precedent, then, amounts to a dispute over the exact commands of *stare decisis*.

Such a consequence is unavoidable. From a theoretical standpoint, one can generally mandate that a judge carefully weigh her desire to overturn a past decision she believes was wrongly decided against the interests of *stare decisis*: predictability and stability. I have attempted to formulate such an account over the past few Sections. I have given an account of what should constitute confidence in the way a case should be decided. Furthermore, I have attempted to specify how much of that confidence one needs to overturn precedent as a function of the interests of stability and predictability operating as second-order principles. Yet, proper application of these second-order principles is not a task for which one can write an algorithm. It is a difficult task over which judges will disagree, even when operating in good faith. It requires sensitive application of certain principles to a highly particularized set of facts. Disagreement is an inevitability.

In fact, the doctrine of *stare decisis* is a recognition that mistakes happen and disagreements occur. It allows a legal system to balance the interest in correcting those mistakes with the countervailing need for stability. Of course, judges will disagree about whether a particular precedent is erroneous. *Stare decisis* mediates that disagreement by affording more weight to precedential reasoning. At the same time,

¹²² Yet, a commensurate opportunity may exist. The first conception forces the judge to consider how predictability and stability should be weighed against other first-order principles. Potentially, this assessment may require a judge to weigh stability and predictability against *each* first-order interest when determining the relative strength of the individual factors. This kind of balancing act may provide identical results to those achieved by treating the interests of predictability and stability as second-order principles.

however, it allows a judge to overcome such a presumption when she has a sufficient degree of confidence. In this way, stare decisis establishes ground rules that provide a basis for principled accommodation of such disagreement.

Yet, when a judge applies the doctrine of stare decisis, she is no more immune from mistake than in any other determination about the proper balance of principles. A judge could overestimate the importance of predictability in a particular precedent, for example. The doctrine of stare decisis must recognize that judges will make mistakes even when applying the very doctrine of stare decisis itself. And as always, judges will disagree as to when these mistakes occur. While I have said that stare decisis establishes ground rules to accommodate disagreement, one can now see that such rules are only provisional. They are provisional in the sense that their proper application is not immune from debate and, ultimately, revision.

G. *Disagreement at Both Levels: Roe v. Wade*

As I noted at the outset, the Supreme Court in *Casey* carefully considered the mandates of stare decisis when it reconsidered and upheld *Roe*. The Court stated:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.¹²³

The Court enumerated a series of factors important for the reconsideration of a prior holding: (1) the practical workability of the current rule, (2) people's reliance on the rule, (3) any development in other areas of law that has made the precedent outdated, and (4) any change to the factual premises behind the rule.¹²⁴ In its discussion of these factors, one can see the Court weighing the interests of stare decisis: the Court balances predictability and stability, on the one hand, with the interest of remedying past error, if any, on the other. For example, the Court found no indication of practical unworkability and took this as evidence of *Roe*'s validity.¹²⁵ To take another example, the second consideration explicitly acknowledges the expectations of those

¹²³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992).

¹²⁴ *Id.* at 854-55.

¹²⁵ *Id.* at 855.

who have come to rely on the law. The Court found this factor to weigh particularly heavily, saying that, since *Roe*, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."¹²⁶

The Court interpreted these and other factors as weighing in favor of affirming *Roe*. The majority determined that the weight of the first-order principles in favor of the right to abortion, "combined with the force of stare decisis," was enough to outweigh "the reservations any [Justice] may have [had] in reaffirming" *Roe*.¹²⁷

The majority did not stop there, however. It distinguished *Roe* as deserving special treatment under the doctrine of stare decisis. Unlike the vast majority of cases, the Court stated that,

[w]here . . . the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.¹²⁸

This premise, if true, demands the highest level of confidence imaginable for purposes of overruling *Roe*.¹²⁹ To justify setting the bar so high, the majority compared *Roe* to the *Lochner v. New York*¹³⁰ and *Plessy v. Ferguson*¹³¹ decisions, the overrulings of which proved monumental.¹³² In overruling the former, the Court rejected *Lochner*'s mantra of contractual freedom, which effectively denied the states the ability to accomplish improvements in working conditions.¹³³ In overruling the latter, the Court repudiated the "separate but equal" interpretation of the equal protection clause.¹³⁴ In both instances, the Court only rejected the precedent on the basis of many years' experience, as well as

¹²⁶ *Id.* at 856.

¹²⁷ *Id.* at 853 (italics omitted).

¹²⁸ *Id.* at 866-67.

¹²⁹ See DWORKIN, *supra* note 78, at 115 ("So important a decision should not be overruled, after nearly twenty years, unless it is clearly wrong . . .").

¹³⁰ 198 U.S. 45 (1905).

¹³¹ 163 U.S. 537 (1896).

¹³² *Lochner* and *Plessy* were overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937), and *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954), respectively.

¹³³ *West Coast Hotel*, 300 U.S. at 379.

¹³⁴ *Brown*, 347 U.S. at 494-95.

a changed understanding of the principles underlying the Constitution. As the *Casey* Court put it, to overrule *Roe* "in the absence of the most compelling reason to reexamine a watershed decision" would undermine "the Court's legitimacy beyond any serious question."¹³⁵ To frame the Court's analysis in the terminology I have established, the Court found that the second-order function of the principles of stare decisis operated so as to demand the highest level of confidence possible to reject *Roe*.

The partial dissent vigorously disagreed at two levels. At the first level, it disagreed with the balance of first-order principles inherent in *Roe*. The partial dissent rejected *Roe*'s interpretation of the string of privacy cases (starting with *Stanley v. Georgia*¹³⁶) as granting an all-encompassing right to privacy.¹³⁷ That is, it repudiated the "right of personal privacy" created by *Roe*:¹³⁸ "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹³⁹ Thus, it rejected outright the chief first-order principle upon which *Roe* relied. The confidence of the partial dissent that *Roe* was erroneously decided should correspond to the strength of its belief that women have no such liberty in the Constitution.

At the second level, the partial dissent's disagreement took on two forms. First, it opposed the Court's application of certain principles of stare decisis.¹⁴⁰ Second, it insisted that at crucial places the Court had applied the wrong standards.¹⁴¹ For example, while the partial dissent generally agreed with the applicability of certain factors, such as the importance of reliance, it took issue with the Court's application of them. The Rehnquist opinion disputed the applicability of "any traditional notion of reliance" for two reasons.¹⁴² For one, the majority in *Casey* had already altered the trimester framework upon which people had come to rely.¹⁴³ Rehnquist argued that, if reliance

¹³⁵ 505 U.S. at 867.

¹³⁶ 394 U.S. 557 (1969).

¹³⁷ See *Casey*, 505 U.S. at 951 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing against a "right of privacy").

¹³⁸ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

¹³⁹ *Id.* at 153.

¹⁴⁰ See *Casey*, 505 U.S. at 955-57 (Rehnquist, C.J., concurring in part and dissenting in part) (criticizing the application of factual underpinnings, doctrinal foundations, and reliance interests in *Roe*).

¹⁴¹ See *id.* at 958-64 (criticizing the distinction of *Roe* as a more important and protected ruling).

¹⁴² *Id.* at 956.

¹⁴³ *Id.* at 873.

on the trimester framework was not important, then perhaps reliance on other elements of the holding was not either. Additionally, he argued that people could take immediate account of the Court rejecting *Roe*.¹⁴⁴ That is, while many people had indeed come to rely on *Roe*, Rehnquist could discern no reason why people could not make an immediate adjustment given the nature of family planning.

The partial dissent took issue with more than the proper application of such principles. It disagreed with the majority over which principles even applied, and most importantly, it rejected the Court's elevation of *Roe* as a special case for which one would need the highest level of confidence to reject.¹⁴⁵ One should understand this conflict not as a disagreement over the proper application of a given standard, but instead, as a dispute over what the proper standard should be. In Justice Scalia's partial dissent, for example, he mocked the suggestion that *Roe* resolved the divisive issue of abortion. He proclaimed instead that it had only served to amplify the debate and improperly take the issue away from the states.¹⁴⁶

One can now see that *Roe* is an exemplar of precedential reasoning over which judges can disagree both about its balance of first-order principles and how much weight it should be afforded as precedent. In the following passage, Dworkin accurately proscribes how the partial dissent should proceed:

[*Roe*'s opponents] should try to meet [its proponents' arguments] in the traditional way, by explaining why principles different from those mentioned, which do not yield a right to abortion, provide a more satisfactory interpretation of the Constitution as a whole and of the Court's past decisions under it. Of course different judges will come to very different conclusions about which principles provide the best interpretation of the Constitution, and since there is no neutral standpoint from which it can be proved which side is right, each justice must in the end rely on his or her convictions about which argument is best.¹⁴⁷

Not only must a judge rely on her convictions—her degree of confidence—about the merits of the underlying case, she must also rely on her convictions about the proper amount of conviction the precedent demands—how much confidence is enough.

¹⁴⁴ *Id.* at 956 (Rehnquist, C.J., concurring in part and dissenting in part).

¹⁴⁵ *Id.* at 956-64.

¹⁴⁶ *Id.* at 995 (Scalia, J., concurring in part and dissenting in part).

¹⁴⁷ DWORKIN, *supra* note 78, at 54.

CONCLUSION

Within Dworkin's theory of adjudication, I argued for the normative considerations that should constitute a judge's degree of confidence appropriate to reject precedent. I argued that one's confidence should correspond to the strength of the balance of first-order principles. I noted that this account assumed that a judge is capable of a good faith balancing effort. The amount of confidence necessary to reject precedent, we explored, should correspond with the strength of the principles in favor of the precedent, as well as the interests of stare decisis, operating as second-order principles. Yet, we recognized that a judge is no more immune from mistake regarding the proper application of stare decisis than in any other attempt to balance principles.¹⁴⁸ As a consequence, one cannot provide, even from the perspective of a theory of adjudication, agreement over the amount of confidence sufficient to overturn precedent. To a large extent, the dispute between the majority and minority in *Casey* is a realization of this conclusion. Even so, for a judge committed to Dworkin's framework, the inevitability of disagreement at both levels does not justify resignation. Instead, the proper response is to articulate as best one can why one's balance of both first- and second-order principles provides the best interpretation of the relevant law.

¹⁴⁸ *Supra* p. 1249.

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